Public Prosecutor v Pertubuhan Kebangsaan Melayu Bersatu

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO WA-44–120–06 OF 2019
MOHAMED ZAINI J
20 FEBRUARY 2020

Criminal Procedure — Forfeiture — Bank account — Prosecution filed application to forfeit monies in respondent's bank account pursuant to s 56(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 — Whether monies in respondent's bank account fully utilised — Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 4(1), 55 & 56(1) — Malaysian Anti-Corruption Commission Act 2009 s 23

This was an application by the prosecution under s 56(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the Act') for an order of forfeiture of the sum of RM192,965,413.61 and interest accrued, which was maintained in the respondent's CIMB account No 8600002579 ('the respondent's bank account'). The prosecution alleged that the monies transferred from the bank account of the former Prime Minister of Malaysia, Dato' Seri Najib bin Tun Abdul Razak ('DSNR') to the respondent's bank account were proceeds of unlawful activities committed by DSNR under s 4(1) of the Act and also s 23 of the Malaysian Anti-Corruption Commission Act 2009. In resisting the application, the respondent submitted, inter alia, that the monies had been fully utilised by the respondent for the thirteenth general election and that the monies remaining in its bank account as at 13 May 2019 amounting to RM212,965,413.61 that the prosecution had attempted to forfeit were from the contributions of other sources. In support of the argument, the respondent had in its affidavit exhibited the cheque images for the contributions. The issue to be determined in the present case was whether the monies had been fully utilised.

Held, dismissing the application:

(1) Based on the respondent's bank statement, the balance remaining in the respondent's bank account as at the end of 2013 was RM26,083,047.49, and was merely RM1,008,401.75 as at September 2014. This supported the respondent's contention that by September 2014, the monies deposited by DSNR had mostly been spent. It was clear that the funds in the respondent's bank account were not from DSNR's deposits and were instead funds from other sources. In gist, there was nothing left from the monies deposited by DSNR into the respondent's bank account to be

forfeited, even if it was to be assumed that the monies were proceeds of unlawful activities (see paras 24–26 & 33).

(2) An order of forfeiture under s 56 of the Act could only be made against the property itself, which in the present case were the monies deposited by DSNR. A reading of s 56 of the Act also showed that the property must be specific. As for example, the property could be a house, which would have been easier to identify, compared to monies which were fluid and easily spent. The court was of the view that s 56 of the Act, unlike s 55 of the Act, made no provision for the court to forfeit, or order the respondent to pay a penalty equivalent to the same amount sought to be forfeited (see paras 27–28).

[Bahasa Malaysia summary

Ini adalah permohonan oleh pihak pendakwaan berdasarkan s 56(1) Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil daripada Aktiviti Haram 2001 ('Akta') untuk perintah perampasan bagi wang berjumlah RM192,965,413.61 dan faedah terkumpul, yang disimpan dalam akaun CIMB responden No 8600002579 ('akaun bank responden'). Pihak pendakwaan mendakwa bahawa wang yang dipindahkan dari akaun bank bekas Perdana Menteri Malaysia, Dato' Seri Najib bin Tun Abdul Razak ('DSNR') ke akaun bank responden adalah hasil daripada aktiviti haram yang dilakukan oleh DSNR di bawah s 4(1) Akta dan juga s 23 Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009. Dalam menafikan permohonan tersebut, responden berhujah, antara lain, bahawa wang tersebut telah digunakan sepenuhnya oleh responden untuk pilihan raya umum ketiga belas dan wang yang berbaki di dalam akaun banknya setakat tarikh 13 Mei 2019 berjumlah RM212,965,413.61 yang cuba dirampas oleh pihak pendakwaan adalah dari sumbangan sumber-sumber lain. Untuk menyokong hujah tersebut, responden dalam afidavitnya mengemukakan gambar cek bagi sumbangan tersebut. Isu yang perlu ditentukan dalam kes semasa adalah sama ada wang tersebut telah digunakan sepenuhnya.

Diputuskan, menolak permohonan:

(1) Berdasarkan penyata bank responden, baki yang terdapat di dalam akaun bank responden pada akhir tahun 2013 adalah sebanyak RM26,083,047.49, dan hanya RM1,008,401.75 pada bulan September 2014. Ini menyokong hujah responden bahawa pada bulan September 2014, wang yang didepositkan oleh DSNR kebanyakannya telah dibelanjakan. Sudah jelas bahawa dana dalam akaun bank responden bukan dari deposit DSNR dan sebaliknya merupakan dana dari sumber-sumber lain. Secara keseluruhannya, tidak ada yang tersisa dari wang yang dimasukkan oleh DSNR ke dalam akaun bank responden untuk dirampas, walaupun jika dianggap bahawa wang tersebut merupakan hasil daripada kegiatan haram (lihat perenggan 24–26 & 33).

(2) Perintah perampasan di bawah s 56 Akta hanya dapat dibuat terhadap harta itu sendiri, di mana dalam kes ini adalah wang yang didepositkan oleh DSNR. Pembacaan s 56 Akta juga menunjukkan bahawa harta tersebut mestilah khusus. Sebagai contoh, harta tersebut mungkin sebuah rumah, yang lebih mudah untuk dikenal pasti, berbanding dengan wang yang berubah-ubah dan mudah dibelanjakan. Mahkamah berpendapat bahawa s 56 Akta, tidak seperti s 55 Akta, tidak membuat peruntukan untuk mahkamah merampas, atau memerintahkan responden membayar denda setara dengan jumlah seperti yang ingin dirampas (lihat perenggan 27–28).]

Cases referred to

PP v Kuala Dimensi Sdn Bhd & Ors [2018] 6 MLJ 37; [2019] 3 CLJ 650, CA (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 3, 3(1), 4(1), 44, 55, 55(2), 56, 56(1), (2), 61(2)

Malaysian Anti-Corruption Commission Act 2009 s 23, Second Schedule

Samiaah Rhazali (Abdul Rashid Sulaiman and Mahadi Abd Jumaat with her) (Senior Federal Counsel, Attorney General's Chambers) for the applicant.

Hariharan Tara Singh (Tania Scivetti and Nurfazreen Hazrina bt Rahim with him) (Scivetti & Assoc) for the respondent.

Mohamed Zaini J:

FACTS

[1] The prosecution had sought to forfeit monies in the respondent's bank account which it claims were proceeds from an unlawful activity.

[2] The prosecution's application was made under s 56(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the Act'). The prosecution had sought for an order of forfeiture of the sum of RM192,965,413.61 and interests accrued, which was maintained in the respondent's CIMB bank account No 8600002579 ('the respondent's bank account').

[3] The prosecution's application under s 56(1) of the Act was premised on an offence under s 4(1) of the same Act, namely dealing with the proceeds of an unlawful activity. The unlawful activity alleged by the prosecution in this case concerned the acts allegedly committed by the previous Prime Minister of Malaysia, Dato' Seri Najib bin Tun Abdul Razak ('DSNR'), who was also the

respondent's president then. The prosecution had in its affidavits sought to elaborate the events that they claim culminated in the offence committed by DSNR. I will however narrate it concisely.

[4] DSNR was at the material time the Chairman of the Board of Advisors of a company known as 1 Malaysia Development Berhad ('1MDB'). He was also at the material time the Minister of Finance other than being the Prime Minister. The prosecution in essence, alleged that DSNR had in abusing his position as the Chairman of 1MDB's Board of Advisors and also as the Minister of Finance, caused huge amount of monies to be transferred into his personal bank accounts from 1MDB's public funds, for his own personal use. The transfers of these monies into DSNR's personal bank account were done in tranches between 22 March 2013 and 10 April 2013.

[5] DSNR had between April 2013 and August 2013 deposited monies into the respondent's bank account from his personal bank account. The prosecution alleged that the monies deposited by DSNR into the respondent's bank account were proceeds of the offences alleged against DSNR. The deposits were done through seven cheques issued by DSNR. This is not disputed. The details of the cheques deposited are as follows:

(a) cheque No 572079 dated 9 April 2013 for RM100m;

(b) cheque No 571902 dated 19 April 2013 for RM50,000;

(c) cheque No 571903 dated 19 April 2013 for RM50,000;

(d) cheque No 571904 dated 20 April 2013 for RM50m;

(e) cheque No 571905 dated 20 April 2013 for RM50m;

(f) cheque No 571948 dated 19 June 2013 for RM25m; and

(g) cheque No 571854 dated 1 August 2013 for RM20m.

[6] The prosecution's investigation revealed that the amount in the respondent's bank account as at 13 May 2019 was RM212,965,413.61. The prosecution filed this application on the 19 June 2019. A freezing order was issued against the respondent's bank account on the 25 June 2018 pursuant to s 44 of the Act.

[7] DSNR had since been slapped with a charge under s 23 of the Malaysian Anti-Corruption Commission Act 2009 ('the MACC Act 2009'), and 21 charges under s 4(1) of the Act. The former is essentially the offence of using one's office or position for gratification. The trial in respect of the charges against him was still ongoing when this application was heard.

THE APPLICATION

[8] The prosecution alleged that the monies transferred from DSNR's account into the respondent's bank account were proceeds of unlawful activities committed by DSNR under s 4(1) of the Act and also s 23 of the MACC Act 2009.

[9] The prosecution's forfeiture application was filed within 12 months from the date of the freezing order, as required under s 56(1) of the Act. A third party notice pursuant to s 61(2) of the Act was also published in the on the 24 July 2019. No third parties had come forward to stake their claim on the monies sought to be forfeited by the prosecution.

[10] The court, under s 56(2) of the Act, shall make an order of forfeiture, if it is satisfied that the allegations levelled by the prosecution had been proven. The threshold for the burden of proof is on a balance of probabilities. It is incumbent for the prosecution to prove that the monies sought to be forfeited were the proceeds of an unlawful activity. The definition of 'unlawful activity' under s 3(1) of the Act is as follows:

> 'Unlawful activity' means —
>
> (a) any activity which constitutes any *serious offence* or any foreign serious offence; or
>
> (b) any activity which is of such a nature, or occurs in such circumstances, that it results in or leads to the commission of any serious offence or any foreign serious offence,
>
> regardless whether such activity, wholly or partly, takes place within or outside Malaysia; (Emphasis addded.)

[11] 'Serious offence' in turn is also defined under the same section as follows:

> (a) *any of the offence specified in the Second Schedule*;
>
> (b) an attempt to commit any of those offences; or
>
> (c) the abatement of any of those offences; (Emphasis added.)

[12] The offence stipulated under s 23 of the MACC Act 2009 is one of the offences specified under the Second Schedule, which is therefore defined as a 'serious offence' within the definition of s 3(1) of the Act.

[13] The prosecution alleged that the monies sought to be forfeited under s 56(1) of the Act are 'proceeds of an unlawful activity', which under s 3 of the Act is defined as:

means any property, or any economic advantage or economic gain from such property, within or outside Malaysia —

(a) which is wholly or partly —

(i) derived or obtained, directly or indirectly, by any person from any unlawful activity;

(ii) derived or obtained from a disposal or other dealings with the property referred to in subparagraph (i); or

(iii) acquired using the property derived or obtained by any person through any disposal or other dealing referred to in subparagraph (i) or (ii); or

(b) which, wholly or partly, due to any circumstances such as its nature, value, location or place of discovery, or to the time, manner or place of is acquisition, or the person from whom it was acquired, or its proximity to other property referred to in subparagraph (a)(i), (ii) or (iii), can be reasonably believed to be property falling within the scope of subparagraph (a) (i), (ii) or (iii).

[14] The respondent in resisting the application had put up several arguments, which were as follows:

(a) that the monies were not the subject matter or proceeds of an unlawful activity;

(b) that the respondent was rightfully entitled to the monies;

(c) the prosecution had failed to meet the pre-requisite conditions under s 56(1) of the Act; and

(d) the monies have been fully utilised.

FINDINGS

[15] I had found it necessary to only consider the final ground submitted by the respondent, namely, whether the monies have been utilised, for reasons that I shall now elaborate.

[16] The respondent claimed that they have fully utilised the monies received from DSNR. It claimed that the monies were used for the purposes of the thirteenth general election, and also its activities. The respondent had in its affidavit exhibited its bank's statement of account dated 31 December 2013 and 30 September 2014. The amount left in the respondent's bank account as at 31 December 2013 was RM26,083,047.49, and RM1,008,401.75 as at 30 September 2014. The respondent claimed that this proves that it had already spent all the monies deposited by DSNR.

[17] The respondent claimed that the amount in its bank account that the prosecution had frozen and is now attempting to forfeit, were from other sources, as it had over a period of time received contributions from other sources, which were as follows:

(a) RM400m on the 11 October 2017 from Seaport Terminal (Johore) Sdn Bhd through a CIMB cheque dated 9 October 2017;

(b) RM100m on the 16 April 2018 from Sykt Seri Yakin Sdn Bhd through a CIMB cheque dated 16 April 2018;

(c) RM60m on the 28 March 2018 from Sykt Temasek Padu Sdn Bhd through a Maybank cheque dated 20 March 2018; and

(d) RM457,731,808.59 in May 2018 from other sources.

[18] The respondent had in its affidavit exhibited the cheque images for the contributions, and also its bank's statement of account for the month of May 2018.

[19] The respondent contended that the prosecution could not forfeit the monies currently in its bank account, as they were contributions from other sources. The prosecution in response contended that any amount left in the respondent's bank account is deemed to be classified as proceeds of an unlawful activity once they are mixed with the monies deposited by DSNR.

[20] It is necessary to consider s 56 of the Act in its entirety. Section 56 of the Act states as follows:

> Forfeiture of property where there is no prosecution
>
> (1) Subject to section 61, where in respect of any property seized under this Act there is no prosecution or conviction for an offence under subsection 4(1) or a terrorism financing offence, the Public Prosecutor may, before the expiration of twelve months from the date of the seizure, or where there is a freezing order, twelve months from the date of the freezing, apply to a judge of the High Court for an order of forfeiture of that property if he is satisfied that such property is —
>
> (a) the subject-matter or evidence relating to the commission of such offence;
>
> (b) terrorist property;
>
> (c) the proceeds of an unlawful activity; or
>
> (d) the instrumentalities of an offence.
>
> (2) The judge to whom an application is made under subsection (1) shall make an order for the forfeiture of the property if he is satisfied —
>
> (a) that the property is —
>
> (i) the subject-matter or evidence relating to the commission of an

offence under subsection 4(1) or a terrorism financing offence;

(ii) terrorist property;

(iii) the proceeds of an unlawful activity; or

(iv) the instrumentalities of an offence; and

(b) that there is no purchaser in good faith for valuable consideration in respect of the property.

(3) Any property that has been seized and in respect of which no application is made under subsection (1) shall, at the expiration of twelve months from the date of its seizure, be released to the person from whom it was seized.

(4) In determining whether the property is —

(a) the subject-matter or evidence relating to the commission of an offence under subsection 4(1) or a terrorism financing offence;

(b) terrorist property;

(c) the proceeds of an unlawful activity; or

(d) the instrumentalities of an offence,

the court shall apply the standard of proof required in civil proceedings.

[21] The objective behind s 56 of the Act is to forfeit the property that the prosecution alleged were proceeds of an unlawful activity committed by DSNR. Here, the property concerned is the sum of monies that DSNR had deposited into the respondent's bank account.

[22] The pertinent issue here is whether the monies concerned still exists to be forfeited. I am inclined to confine my findings on whether the amount in the respondent's bank account as at 13 May 2019 relates to the monies deposited by DSNR.

[23] The respondent contended that the amount remaining in its account as at 13 May 2019, was not from the monies deposited by DSNR. It contended that the monies contributed by DSNR have long been spent, and that it had over period of time, received monies from other sources as stated earlier.

[24] I have perused the respondent's bank statement for the relevant periods, and find that the balance remaining in the respondent's bank account as at the end of 2013 was RM26,083,047.49, and was merely RM1,008,401.75 as at September 2014. This lends credence to the respondent's contention, that the monies deposited by DSNR had by September 2014 been spent, if not entirely then at least mostly.

[25] I am of the view that the amount in the respondent's bank account currently remaining could not be said to be from, or part of the amount paid in by DSNR. The amount left in the respondent's bank account as at 30 September 2014 justifies this.

[26] In gist, there is nothing left from the monies paid in by DSNR into the respondent's bank account left to be forfeited, even if it was to be assumed that the monies deposited were proceeds of an unlawful activity as alleged by the prosecution. I took note of the fact that DSNR had deposited the monies between April to August 2013. The prosecution's steps to have the respondent's bank account frozen were done on the 25 June 2018, which was nearly five years after the event. It is more likely than not, that the respondent had spent the monies. The evidence proffered by the respondent supports this.

[27] In my opinion, an order for forfeiture under s 56 of the Act can only be made against the property itself, which in this case were the monies deposited by DSNR. A reading of s 56 of the Act shows that the property concerned must be specific. A part of s 56 for example states:

> ... twelve month from the date of the freezing, apply to a judge of the High Court for an order of forfeiture of that property if he is satisfied ... (Emphasis added.)

[28] For example, the property could be a house, which would have been easier to identify, compared to monies which are fluid and easily spent. The prosecution had not submitted as to whether it could seek to forfeit an amount equivalent to the monies deposited by DSNR. I take the view that s 56 of the Act, unlike s 55, makes no provision for the court to forfeit, or order the respondent to pay a penalty equivalent to the same amount sought to be forfeited.

[29] Section 55 of the Act is as follows:

> Forfeiture of property upon prosecution for an offence
>
> (1) Subject to section 61, in any prosecution for an offence under subsection 4(1) or a terrorism financing offence, the court shall make an order for the forfeiture of any property which is proved to be —
>
> (a) the subject-matter or evidence relating to the commission of such offence;
>
> (b) terrorist property;
>
> (c) the proceeds of an unlawful activity; or
>
> (d) the instrumentalities of an offence,
>
> Where —
>
> (aa) the offence is proved against the accused; or
>
> (bb) the offence is not proved against the accused but the court is satisfied that —

(i) the accused is not the true and lawful owner of such property; and

(ii) no other person is entitled to the property as a purchaser in good faith for valuable consideration.

(2) *Where the offence is proved against the accused but the propertv referred to in subsection (1) has been disposed of, diminished in value or cannot be traced, the court shall order the accused to pay as a penalty a sum which is equivalent to, in the opinion of the court, the value of the property. and any such penalty shall be recoverable as a civil debt due to the Government of Malaysia and shall not be subject to any period of limitation prescribed by any written law.* (Emphasis added.)

[30] Section 55 of the Act, unlike s 56, concerns an application for forfeiture against a person charged with an offence under s 4(1) of the Act, or a terrorism financing offence. Similar to s 56, it makes provision for the forfeiture of a property that is the subject matter of the offence that the accused is charged for. However, unlike s 56, s 55 makes provision for a situation where the property sought to be forfeited 'has been disposed of, diminished in value or cannot be traced', in which case the court is empowered to order the respondent to pay as a penalty a sum equivalent to the value of such property. This is clearly provided for under s 55(2) of the Act. There is no corresponding provision under s 56.

[31] I am fortified in my view with the observation made by the Court of Appeal in the case of *Public Prosecutor v Kuala Dimensi Sdn Bhd & Ors* [2018] 6 MLJ 37; [2019] 3 CLJ 650 (CA). The appellate court there remarked that the prosecution could not prove which of the monies in the respondent's bank account were from unlawful activities, as they were co-mingled with legitimate funds. The relevant passages of the judgment are as follows:

[115] The respondents, on the other hand, have tendered evidence to prove that the money received for the drainage and water supply and electrical works complained of was paid to KDSB from the funders pool of monies, over time, from 2004 to 2008.

[116] The source documents for the funding exercise have been disclosed. As stated by the learned judge, which we find no reason to disagree with, the legality of the funding exercise is not in dispute.

[117] It is a fact that all these money were mixed together with other money and are obviously no longer in the account of KDSB. The money paid to KDSB for the drainage and water supply works and the 33KV electrical works are mixed together with other money legitimately earned under DA1, DA2, ADWA, NADWA and various other development contracts undertaken by WBSB and WBCSB.

[118] It has to be pointed out that IO Supt Rajagopal's complaints relate to money that were paid to KDSB from 2004 to 2008. *It is not possible to identify these money and then separate them from all the other money legally earned under these contracts and other contracts over the years.*

[119] *For the reasons mentioned above, it is clear that the PP has not established, on a balance of probabilities, that the money and property seized had been obtained as a result*

of or in connection with an offence under sub s 4(1) of AMLATFA. (Emphasis added.)

CONCLUSION

[32] It is clear that the funds in the respondent's account were not from DSNR's deposits, and were instead funds from other sources. The prosecution could not seek to forfeit monies which were no longer in existent, and as I have remarked earlier, even if it was to be assumed that the monies were proceeds of an unlawful activity. It is therefore not necessary to go into the merits of the prosecution's other grounds nor the respondent's, for the subject matter of the forfeiture is no longer there. I am therefore left with no alternative but to dismiss the prosecution's application.

Application dismissed.

Reported by Dzulqarnain bin Ab Fatar